SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 757

LYLE A. DE SPAIN, ET AL., ETC.,
Respondents,

vs.

DE KALB COUNTY COMMUNITY SCHOOL DISTRICT 428, ET AL., ETC.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETER FITZPATRICK,
GEORGE KAYE,
10 South LaSalle Street,
Chicago, Illinois 60603,
Area 312 CE 6-3914,
Attorneys for Petitioners.

JOHN A. LEIFHEIT,
151 West Lincoln,
DeKalb, Illinois 60115,
Of Counsel.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	
1. Limits of Permissible Court Action	2
2. Limits of Permissible Public School Initiative	2
3. Application of FRCP 52(a)	2
Constitutional Provision Involved	3
Rule Involved	3
Verse Under Consideration	3
Statement of the Case	3
Reasons for Granting the Writ:	
1. The Opinion of the Court of Appeals Misinterprets Supreme Court Decisions So as to Invite Use of Subjective Constitutional Criteria	7
2. Courts Should Invade the Classroom Only When Plain Necessity Demands	12
3. Application of FRCP 52(a) Would Bar Reversal of the District Court's Findings	17
Conclusion	19
Appendix A—Opinion of District Court	21
Appendix B—Opinion of Court of Appeals	43
Appendix C—Judgment of Court of Appeals	56

Table of Authorities.

Cases.

Engel v. Vitale, 370 U. S. 421 (1962) 5, 7

Lewis v. Allen, 14 N. Y. 2d 867, 200 N. E. 2d 767, 252 N. Y. S. 2d 80, cert. den. No. 477, 379 U. S. 923, 13 L. ed. 2d 336, 85 S. Ct. 279 (1964) 14

McGowan v. State of Maryland, 366 U. S. 420 (1961) 8, 16, 18

School District of Abington Tp. v. Schempp, 374 U. S. 203 (1963) 5, 7

Stein v. Oshinsky, 348 F. 2d 999 (2d Cir. 1965) 11

Law Reviews.

Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases,* The Supreme Court Review 1, 10-14 (1963) 15

Comment, *Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation,"* 61 Northwestern Univ. L. Rev. 795, 804 n. 55 (Nov.-Dec. 1966) 15

Hammett, *The Homogenized Wall,* 53 A. B. A. J. 929 (Oct. 1967) 16

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U. S. Const., Amend. I 2, 3, 13, 15

Federal Rule of Civil Procedure 52(a) 2, 3, 6, 17

28 USC § 1254(1) 2

28 USC § 1343(3) 3

36 USC § 172 14

Cox, The Secular City (1966) 18

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Petitioners, DeKalb County Community School District 428, *et al.*, defendants-appellees below, petition this Court to issue its writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit in case No. 15836, reversing a judgment and orders of the United States District Court for the Northern District of Illinois, Eastern Division, in case No. 66 C 543.

OPINIONS BELOW.

The opinion of the District Court is reported at 255 F. Supp. 655 and is reproduced as Appendix A. The opinion of the Court of Appeals is reported at ..... F. 2d ..... and is reproduced as Appendix B.

JURISDICTION.

The Court's jurisdiction to review the judgment is invoked under 28 USC § 1254 (1). The judgment of the Court of Appeals was entered July 26, 1967.

QUESTIONS PRESENTED.

1. Does the reciting of the verse in question in a public school kindergarten in exactly the same way as other, admittedly secular, verses are recited offend the First Amendment? Does it advance or inhibit religion? Does not the decision of the Court of Appeals go beyond permissible limits to destroy the initiative of the public school in the performance of its duty to inculcate social virtues?

2. In view of the goal of kindergarten to integrate the child into society and to invite a social responsiveness from him by prompting a habitual reaction of pleasure and possessiveness to the world around him, does reciting this verse, patently useful to that end, in kindergarten become impermissible because some parents may relate it to thanking God (only one of several interpretations) rather than to its secular purposes? Is the public school kindergarten, as a matter of law, restricted to what is devoid of possible religious import?

3. Should not Federal Rule of Civil Procedure 52 (a) apply to this kind of controversy as it does to others and bar reversal of the District Court's finding, resolving a question arising from a conflict in evidence and not clearly erroneous: that the verse, considered in the context of the whole kindergarten day, and considered in the light of the behavior of the children while saying it, is not a religious prayer but a secular poem? Or are evidence findings immaterial in a case of this kind?

CONSTITUTIONAL PROVISION INVOLVED.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U. S. Const., Amend. I.

RULE INVOLVED.

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ." Federal Rule of Civil Procedure 52 (a).

VERSE UNDER CONSIDERATION.

"We thank you for the flowers so sweet;
We thank you for the food we eat;
We thank you for the birds that sing;
We thank you for everything." (A. 5.)

STATEMENT OF THE CASE.

During the 1965-1966 school year the foregoing verse was recited in the kindergarten at Ellwood Public School, De Kalb, Illinois. Laura I. De Spain at age five was a pupil in the kindergarten, and her parents Lyle A. and Mary R. De Spain brought suit under 28 USC § 1343(3) to enjoin recitation of the verse, contending that it was a prayer. The defendants were the local School District, the Board of Education, the superintendent of schools, the principal of the Ellwood Public School, and the kindergarten teacher, Esther Watne (A. 1).

The District Court heard the testimony of 16 witnesses and considered many exhibits. Laura's father and her older brother did not visit the kindergarten during the year covered by the complaint. Her mother came to the class once during that year (A. 21). The testimony of the

De Spains, parents and children, tended to show that the class assumed a physical attitude of devotion during recitation of the verse and concluded with the word "amen" (A. 20).

The testimony for plaintiffs was flatly contradicted by the other witnesses (A. 93-114, esp. 109, 114-118, esp. 116, 135-139, esp. 137, 139-143, esp. 141, 163-171, esp. 169, 176-181, esp. 178-9; App. A p. 25). They testified in substance that the teacher and children acted normally while reciting the verse, in no way differently than while saying other verses.

The teacher, Mrs. Esther Watne, testified that the purpose of saying the verse before the morning snack was to teach the children social manners and good citizenship in that everyone was taught to wait until all in the room were served before beginning to eat (A. 131).

Plaintiff's theological witness, Dr. A. Donald Davies, conceded that the verse taken by itself, isolated, would not be considered a prayer (A. 68, 69). He testified that if the verse were said following the thanking of persons not present for gifts of food, cake or cookies (as it was said), it could not be considered a prayer (A. 68). Depending on the context, he agreed that there were many ways in which it could be interpreted other than as a prayer (A. 69).

Dr. Davies' testimony showed him to be familiar with the theory and methods of kindergarten, and he conceded the secular objectives of including this verse in the kindergarten curriculum (A. 61-62): to create an emotional realization in the child that he, in an intimate way, possesses the things he sees about him in his environment; to give the child a feeling of integration with the physical universe; to give the child the feeling that he has a particular place, not just in the little community of the kindergarten, but in the wide community of all people that he might

meet; to encourage the child that the world about him is not something by which he is threatened, but something that exists for his enjoyment, to inculcate security and possessiveness in the child. These, agreed Dr. Davies, are all valid temporal secular values (A. 62).

Dr. Davies also conceded that in all honesty he would have to say that it would be useful and meaningful to recite the poem in question to give the child a feeling of integration in his physical environment even on an assumption that there is no God (A. 58-59); that since the name of God was omitted the verse might be regarded as an expression of gratitude to the community of animate and inanimate things and human beings in which we live (A. 65).

On the evidence the District Court concluded that the plaintiffs had not proved that the verse was said in a devotional or prayerful manner, accompanied by "amen", and that in the framework of the whole kindergarten day the primary object of saying the verse was not to pray, and was not religious (A. 212, 228) (App. A, pp. 24, 40) but to further the secular purposes of kindergarten: "... its purpose was not to pray but to instill in the children an appreciation of and gratefulness for the world about them—the birds, the flowers, the food, and everything ..." (A. 228) (App. A, pp. 40-1). Accordingly the trial court dismissed the case for failure of the plaintiffs to state and prove a cause of action.

On plaintiff's appeal the dismissal was reversed by a divided court. Two judges of the Court of Appeals were of the view that the verse is a prayer whose public school recitation is proscribed by *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), and *Engel* v. *Vitale*, 370 U. S. 421 (1962). In a footnote these judges held immaterial the finding of the trial court against plaintiffs that recitation of the verse was not accompanied by a devotional

attitude on the part of the class. They felt that the primary purpose of the verse was religious and that its secular purposes were secondary.

The dissenting judge accepted the secular effects of the verse as primary in light of the finding below that the recitation occurred in a non-devotional setting, a finding which was not clearly erroneous under Federal Rule of Civil Procedure 52(a) (App. B, pp. 51-54).

REASONS FOR GRANTING THE WRIT.

1. THE OPINION OF THE COURT OF APPEALS SHOULD NOT BE ALLOWED TO STAND. IT MISINTERPRETS THE DECISIONS OF THIS COURT AND INVITES CHALLENGES TO PUBLIC SCHOOL CURRICULA GROUNDED ON CONTENTIONS THAT RELIGION IS ADVANCED OR INHIBITED WHERE THE ONLY SUPPORT OF THESE CONTENTIONS LIES IN MATTERS OF SUBJECTIVE INTERPRETATION OF THE CURRICULUM COMPLAINED OF. THE KINDERGARTEN VERSE IN QUESTION IS A FAR CRY FROM THE PRACTICES ENJOINED IN ENGEL (REGENTS' PRAYER) AND SCHEMPP (BIBLE READING AND LORD'S PRAYER).

Including this verse in the kindergarten day was done to achieve the secular ends of kindergarten, in marked contrast to the two religious practices forbidden in *Engel* v. *Vitale,* 370 U. S. 421 (1962) and *School District of Abington Tp., Pa.* v. *Schempp,* 374 U. S. 203 (1963). Both the Regents' Prayer, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" (*Engel*), and the reading of "at least 10 verses from the Holy Bible followed by recitation of the Lord's Prayer" (*Abington*) were purposely and designedly exercises of religious piety; if there were any secular benefits resulting from either they were not sought as primary ends but were merely incidental by-products of the very religious nature of the exercises. For this reason both failed to meet the test of constitutionality developed by the Supreme Court. The test, as plaintiffs agree, is that announced by Justice Clark in the *Abington* case, p. 222:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment (the

> activity complained of)? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (Matter in parentheses added.)

The *Abington* case put into words the test which had been developed with care shortly before in the decision dealing with Sunday closing laws, *McGowan* v. *State of Maryland,* 366 U. S. 420 (1961).

The *McGowan* case holds that the state has the right to pursue its secular values although some citizens may receive "religious" benefits and other citizens may feel that their "religious" or "non-religious" interests have been hurt. The practice under consideration, then, is Constitutionally bad only if the primary effect is the advancement or hindrance of religion. Justice Frankfurter, concurring opinion, p. 466, cut through to a solution of the problem then confronting the Court. His observation is pertinent to the conflict presented in this case: ". . . once it is determined that a challenged statute (practice) is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."

The Purpose of Kindergarten.

That the Court may be able to judge whether the inclusion of this verse in the curriculum served a secular purpose and whether its primary effect was a temporal good, and not the promotion or hindrance of religion, we briefly discuss the evidence in this case which presents the verse in context, that is, in relation to the purposes of kindergarten, and its curriculum and methods. The record

(A. 30-44, 60-65, 93-114, 120-135, 143-162, 184-192, Book of Exhibits, pp. 9-138) shows that modern kindergarten is a development of theories of education advanced by many educators, including Plato, 427-347 B. C.; Comenius, 1592-1670; Rousseau, 1712-1778; and Pestalozzi, 1746-1827. The man considered as the father of modern kindergarten is Frederick Froebel, 1782-1852, and, of course John Dewey, 1859-1952, and Maria Montessori, 1870-1952, made great contributions.

Kindergarten takes the 5-year-old and seeks to encourage him to be a useful member of society by developing in him an habitual response of delight and appreciation for the many benefits conferred on him by the community, thus evoking in him the spirit of interest, cooperation and commitment necessary to good citizenship. The evidence was that the method of kindergarten is to build on the immediate observations and experiences of the child in his environment, which consists of (1) the physical community about him and (2) the community of people in which he lives.

The continual recitation of many "thank you" verses is an important device to give the child an emotional conviction of possession. One of the purposes of the verse in question is to develop the emotional realization of the possession of, or of the sharing in, the benefactions of the community.

The Child and His Relationship to the Community of People.

In addition to a consideration of the physical community consisting of the sun, the wind, the rain, the fog, the snow, trees, flowers, seeds, birds, horses, cows, dogs, cats, shells and stones, the kindergarten presents social studies, or citizenship, to interest the child in the other community,

the community of people, his own companions and the older people in his world. Kindergarten has a "Unit On Community Helpers" (Book of Exhibits, p. 116) (A. 121-123) to make the point that society is organized in a fashion which is meaningful to the child; the activities of persons whom the child sees, for example: the policeman, fireman, janitor, truck driver, grocer, milkman, serve the needs of the child. He is taught to say "thank you" for the benefits conferred by each of the community helpers. It is the object of kindergarten that the realization of many benefits continually conferred and habits of joyful appreciation will lead the child to love the community in which he lives, and that he will be an appreciative, cooperative, useful citizen, motivated to be a "community helper."

The fact that the verse in question is said before the 5-year-old eats trains him in the good social manners of saying "thank you" and of waiting until everybody is served rather than making the "snack" become an exercise in an aggressive contest to see who will eat first. The kindergarten is the only time in the education of the child when he will eat as part of a small group of eight of his fellows at a table. After kindergarten he will be one in a cafeteria line, generally with random seating. The verse therefore serves a number of commendable secular purposes to teach cooperative citizenship as a product of feeling and expressing delight and appreciation for the benefits which the community confers.

This verse is appropriate to include in a kindergarten daily schedule (Book of Exhibits, p. 46), because it is one of many verses expressing the relationship between the child and the world. There is the verse "This Happy Day" in which the sun is addressed, "Good morning, Sun," and "Thank you for this happy day, this happy day! Thank you!" (A. 57.) The public school kindergarten is no more seeking to teach gratitude to God by the saying of this

verse than it is seeking to teach pantheism or idolatry in the verses personifying the sun and the wind. The fact that a theologian called by plaintiffs spoke of idolatry (A. 58) in relation to the poem addressed to the sun (Book of Exhibits, p. 76), exposes the absurdity of such reasoning and the folly of judging childhood poetry from an adult point of view. It is enough that both verses express an attitude proper to the development of the child.

The Stein Case.

The weakness of the argument of the majority opinion below is that it relies on the *Stein* case, where the facts and the legal issues are so different from those presented in the instant case.

Stein v. *Oshinsky*, 348 F. 2d 999 (2d Cir. 1965), was an action by parents of schoolchildren for an injunction prohibiting interference with prayer in a public school and requiring that opportunity to pray be afforded the children each day. The parents had made written demand on the defendants "that our children be given an opportunity to acknowledge dependence and love to Almighty God through a prayer each day in their respective classrooms." Their complaint protested that the principal had told his kindergarten teachers to stop class recitation of what plaintiffs termed a "simple and ancient prayer": "God is Great, God is Good and We Thank Him for our Food, Amen!" Plaintiffs also complained that recitation of a verse similar to the one at bar had been discontinued. The Second Circuit Court of Appeals properly held that the complaint should have been dismissed because even assuming *arguendo* that the Establishment Clause would not prohibit New York from allowing plaintiffs' demands, it did not require it. The court observed that the determination of what goes on in the public school is pri-

marily for the school authorities. The objective sought by the parents was expressly a religious one. We submit that the issue presented in the *Stein* case is much different from the fact issue and the legal issue presented by the plaintiffs in the case at bar.

2. EXCEPT TO STOP A PRACTICE WHICH PLAINLY ADVANCES OR INHIBITS RELIGION, THE COURTS SHOULD NOT INTRUDE INTO PUBLIC EDUCATION TO PROHIBIT EVERY SCHOOL ACTIVITY WHICH MAY BE SUSCEPTIBLE TO A RELIGIOUS INTERPRETATION. THIS PRINCIPLE APPLIES ESPECIALLY TO KINDERGARTEN, WHERE THE ACTIONS AND VERSES OF THE CHILDREN OFTEN IMPUTE PERSONALITY AND SENTIENT RESPONSE TO INANIMATE OBJECTS AND FORCES AND SOMETIMES EVEN TO THINGS WHICH EXIST ONLY IN IMAGINATION.

In the kindergarten the child's attention is on immediate benefactors, not on remote or ultimate or first causes. The 5-year-old world is almost a world of sensory perception rather than one of inductive processes usual in philosophy and theology (A. 104). The warm day is attributed to the sun. The 5-year-old child is made cold by the temperature as shown by the thermometer without reference to meteorological causes. He thanks the milkman for the milk, the grocer for the food. His observation of causes is sound as far as it goes. His gratitude is also expressed to a valid object, even though the result and the thanks are not referred back to the first or ultimate cause.

Moreover, a habit of continually acknowledging one's immediate benefactor is an admirable one, in an adult, as well as a 5-year-old child. For example, a wife might say "Thank you for everything" to her husband and mean it literally without offending religious standards or exhibiting lack of religious faith. Her thanks is proper. A practice of giving thanks to the immediate benefactor has a sound

temporal purpose in any situation. It makes for better and more cooperative human relationships, and a pleasanter and more cohesive society. To use Dr. Lipscomb's expression, it fits in with the philosophy of helping the children become a part of "a living society, (a) contributing society" (A. 189).

Mrs. DeSpain testified that when she and her husband appeared before the Board of Education, when they were accompanied by Attorney Silverman, Emory Lehan, a member of the Board of Education, read a statement to the effect that this verse was not a prayer but could refer to anyone—to the milkman, the cookiemaker; and that for this reason anyone would be able to recite it without being offended (A. 28). This characterization of the verse is a sound one. It needs no saying on our part that the intended use of poetry is not that it be dissected, diagrammed and analyzed. It sems a fair statement to say that the intention of all of the little poems is to make the child aware that he is blessed, in a temporal, secular sense, with many advantages by reason of the fact he lives in the community of DeKalb County.

The First Amendment Allows for a Neutral Concept of God.

The First Amendment does not require that God be banished from the public schools (A. 145-154). To do so would not be desirable if it could be accomplished. The word God and the idea God is commonplace in our heritage. As Superintendent Berge explained, the requirement which the Constitution imposes is that the idea of God in the public school be a *neutral* one (A. 152-154). The school must be hospitable to any idea that the child presents of God, because it is the duty of the school not to undermine but to support the training of the home and of the church (A. 146-147, 152). The school will not reject the idea of a per-

sonal God, or a definition of God as the name of the mystery in man's experience, of what cannot be understood, the undefinable. And, if the parent teaches his child that there is no God, that the name God is used by some people to describe what does not exist, the school will accept that, too.

In short, the God of the public schools is the God in the ceremony used in opening the federal courts and in the *Salute to the Flag.* 36 USC § 172, 68 Stat. 249 (1954); *Lewis* v. *Allen,* 14 N. Y. 2d 867, 200 N. E. 2d 767, 252 N. Y. S. 2d 80, cert. den. No. 477, 379 U. S. 923, 13 L. ed. 2d 336, 85 S. Ct. 279 (1964). Without the word God, the verse in question is neutral of forbidden religious implications.

The interpretation of the "thank you" given by Emory Lehan, member of the Board of Education, to the DeSpains, that it was a "thank you" to the child's benefactors, is a reasonable one. The regret expressed by the trial judge (A. 211) that the word "grateful" had not been substituted for "thank you" in the verse indeed reinforces this interpretation. We submit respectfully that the expression "thank you" to 5-year-olds is the equivalent of "we are grateful." Moreover, "thank you" is more suited to children of this age, just as it is less formal and less sophisticated than the expression "thanks," as plaintiffs' expert agreed (A. 60).

Whatever interpretation is given to the "thank you," it obeys the principle that the school must be supportive of what the child is taught at home and must be neutral in the presentation and acceptance equally of religion, nonreligion and irreligion. Whether the child be told outside the school that it is giving thanks to God or not and however God may be explained to the child outside of school, even if the expanation given is that God is the name used by unenlightened persons to designate something which does not exist and to which some people mistakenly attri-

bute happenings whose cause they do not understand, the school is still in its proper role of supporting the training given to the child at home; the school is obeying the command of the First Amendment: that it, as other agencies of the state, be neutral in matters of religion, irreligion and antireligion. The verse as now said is as open to, and as supportive of, the teaching of atheism at home as of religion.

If this verse is held constitutionally bad because someone outside of school may tell the 5-year-old that it refers to God, then by the same standard you would forbid a public school teacher to use the word "good-bye" in taking leave of the class, because someone might explain the etymology to the children. This is admittedly an extreme example but the point of this petition is that the defendants submit that the line must be drawn somewhere. Everything subject to a religious interpretation should not be excluded from the culture transmitted through public education. The First Amendment does not require that public schools so screen everything they impart.

This problem has troubled not only educators but also law review writers. The law reviews refer, to use the language of one of them, to "the condition of apprehensiveness and sensitiveness among school administrators over the possibility that any non-objective teachings in school will be considered religious. This prompts them to 'play safe' by teaching purely objective fact, avoiding deeper moral implications. Educational Policies Commission, [Moral & Spiritual Values in the Public Schools] 53-54 [1951.]" Comment, *Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation,"* 61 Northwestern Univ. L. Rev. 795, 804 n. 55 (Nov.-Dec. 1966).

The problem was also discussed in Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases,* The Supreme

Court Review 1, 10-14 (1963), and recognized in Sky, *The Establishment Clause, The Congress and The Schools: An Historical Perspective,* 52 Va. L. Rev. 1395, 1441 (Dec. 1966). Cf. Hammett, *The Homogenized Wall,* 53 A. B. A. J. 929 (Oct. 1967) (prize-winning Samuel Pool Weaver Constitutional Law Essay).

Of course, the teacher couldn't conduct a worship service of any kind without violating the required public school neutrality. Therefore, the allegation in the complaint filed by the DeSpains that the children and the teacher had assumed a "devotional" and "prayerful attitude," and that the word "amen" concluded the recital was an essential one. Because the plaintiffs failed to prove this allegation their case failed (A. 213-214). Without proof of this allegation there was no prayer service, as complained of by the plaintiffs, and there was no violation of the neutrality prescribed by the First Amendment.

It does not aid plaintiffs' case that Esther Watne acknowledged being a devout woman who gives thanks to God each day, for there is no evidence that she discussed God with the children or tried to impose her personal religious beliefs on her pupils. In accord with the observation of Justice Frankfurter in the *McGowan* case, *McGowan* v. *State of Maryland,* 366 U. S. 420, 466 (1961), that you do not determine the purpose or objective of a Sunday closing law by psychoanalyzing the legislators who passed the act, similarly, the educational and secular purpose of including this verse in a kindergarten curriculum is not determined by cross-examination, in which the particular teacher is required to state her personal beliefs. As a professional teacher she might well "lean backwards" not to force her convictions on the children. The First Amendment requires no more than that she stand upright in neutrality.

3. FEDERAL RULE OF CIVIL PROCEDURE 52 (a) SHOULD APPLY TO THIS KIND OF CONTROVERSY AS IT DOES TO OTHERS AND BAR REVERSAL OF THE DISTRICT COURT'S FINDING, RESOLVING A QUESTION ARISING FROM A CONFLICT IN EVIDENCE AND NOT CLEARLY ERRONEOUS: THAT THE VERSE, SET IN THE FRAMEWORK OF THE WHOLE KINDERGARTEN DAY, IS NOT A RELIGIOUS PRAYER BUT A SECULAR POEM.

Petitioners are school officials confronted by a judicial intrusion into the curriculum at the instance of persons who have placed a particular religious interpretation upon a verse used in kindergarten to help the children, in terms of kindergarten theory, to become contributing members of a living society. The District Judge and the author of the dissenting opinion in the Court of Appeals correctly decided that whether this verse should be used in the kindergarten is a decision for educators and not for judges.

With the one dissent referred to, the Court of Appeals took the verse out of the proved non-devotional setting and held it to be a prayer, notwithstanding the testimony of plaintiff's theological expert that the verse of itself was not a prayer (A. 68-69) but meaningful even on the assumption that there is no God as a useful recitation of a five-year-old to beget in him a feeling of belonging in his environment (A. 58-59).

Federal Rule of Civil Procedure 52 (a) recommends restraint to reviewing courts when they pass on the findings of a trial judge. It is the contention of the defendants that the finding that this verse is not a prayer in the context in which it was used in the instant kindergarten rests upon the judge's finding of fact that there was no physical indication of devotion or religious import. The record shows